IN THE

Supreme Court of the United States

No. 77-257

LT. COL. JOSEPH B. BERGEN

Petitioner,

V.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

OF COUNSEL:

JACK E. MILLER
122 East Oglethorpe Avenue
Savannah, Georgia 31401

Telephone: (912) 233-4141

JOSEPH B. BERGEN
ATTORNEY FOR PETITIONER

Columbia Square Law Offices
125-127 Habersham Street
Savannah, Georgia 31401

Telephone: (912) 233-8001

IN THE

Supreme Court of the United States

No. _____

LT. COL. JOSEPH B. BERGEN

Petitioner,

V.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

OF COUNSEL:

JACK E. MILLER
122 East Oglethorpe Avenue
Savannah, Georgia 31401

Telephone: (912) 233-4141

JOSEPH B. BERGEN
ATTORNEY FOR PETITIONER

Columbia Square Law Offices
125-127 Habersham Street
Savannah, Georgia 31401

Telephone: (912) 233-8001

SUBJECT INDEX

PETITION FOR WRIT OF CERTIORARI

I
OPINION DELIVERED IN COURT BELOW

The petitioner, LIEUTENANT COLONEL JOSEPH B. BERGEN, now a Retired Reserve Air Force Officer, who was formerly an Active Reserve Officer, respectfully seeks the issuance of a Writ of Certiorari to review the summary judgment in favor of the government and against him, and the opinion of the United States Court of Claims entered on cross motions for summary judgment in this proceedings on April 20, 1977, *Docket No. 35674* in the Court of Claims, upon which the petitioner sought a rehearing by motion filed April 29, 1977, that was denied by order filed May 27, 1977. This opinion of the Court of Claims as yet has not been reported. Such Judgment and Opinion and the Order denying rehearing are reproduced in *Appendix A* to this petition.

II
JURISDICTION

The within petition for certiorari is being filed less than ninety (90) days from the aforesaid order entered on May 27, 1977, denying rehearing of the judgment of the United States Court of Claims entered on April 20, 1977, said motion for rehearing having been timely filed on April 29, 1977. The jurisdiction of this court is invoked under *Title 28 U.S.C. §1491; Title 10 U.S.C. §1552; Court of Claims Rules, Rule 131(c),* and *Rule 149(a), Title 28 U.S.C.A.,* as the above judgment and opinion, following the denial of the Motion for Rehearing, became final by its terms.

III
QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Claims had the jurisdiction to hold and correctly held that an Air Force Board for Corrections of Military Record did not act arbitrarily, capriciously, or against the substantial weight of the evidence, in denying petitioner his application for change in the date of his promotion to Lieutenant Colonel so as the entitle petitioner to promotion to and pay of a Lieutenant Colonel prior to the date

of his actual promotion to Lieutenant Colonel, and so as to thereafter make petitioner eligible for consideration for promotion to and pay of a Colonel prior to involuntarily retiring petitioner from the Active Air Force Reserve at the conclusion of twenty-eight (28) years commissioned service since petitioner was not on a recommended list for Colonel promotion at the expiration of the 28 years commissioned service; and,

2. Whether the United States Court of Claims had the jurisdiction to hold and properly based its opinion in this case on whether the Air Force Board of Corrections of Military Records acted arbitrarily, capriciously, or against substantial weight of evidence rather than on whether there existed legal error in the actions of the Air Force which caused the delay in petitioners promotion to Lieutenant Colonel, pursuant to Statute and Air Force Regulations and Manuals, and of said Board in denying the application of petitioner for correction of his military record to reflect the change in the date of his promotion to Lieutenant Colonel, all contrary to the holding of the Supreme Court of the United States in *United States v. Testan,* 424 U.S. 392, 47 L.Ed. 2nd 114, 96 S.Ct. 948, decided March 2, 1976.

IV
STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. *Title 28 U.S.C. §1491,* provides in pertinent part, as follows: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive

body or official with such direction as it may deem proper and just."

2. *Title 10 U.S.C. §8363(a),* provides, in pertinent part, as follows: "An officer in a reserve grade above second lieutenant may not be considered for promotion, or examined for Federal recognition in the next higher grade, until he completes the following number of years of service, computed under section 8360(a) of this title, in his current reserve grade: (4) Lieutenant Colonel — three years."

3. *Title 10 U.S.C. §8848,* provides, in pertinent part, as follows: " . . . each officer in an active status in the reserve grade of . . . lieutenant colonel who is not on a recommended list for promotion to reserve grade of colonel shall, thirty days after he completes 28 years of service computed under section 8853 of this title — (1) be transferred to the retired service, . . . ".

4. *Title 10 U.S.C. §8366(d),* provides, in pertinent part, as follows: "An officer whose reserve grade is . . . major and whose name is on a recommended list may be promoted at any time to fill a vacancy, . . . ".

5. *Air Force Manual 35-3, Ch. 23, §23-4, Table 23-1,* provides, in pertinent part, as follows: "NOTE: A recommendation may be submitted at any time. However, for an officer to be considered by a specific selection board, the recommendation for his promotion must reach ARPC [Air Force Reserve Personnel Center] no later than 30 days before the Board is scheduled to convene." A verbatim reproduction of said *Table* is set out in *Appendix B* to this petition.

6. *Air Force Manual 35-3, Ch. 23, ¶23-7,* (implementing *Title 10 U.S.C. §8366(d)*), provides, in pertinent part, as follows:

"a. If the name of an officer recommended for promotion under this chapter is already on a recommended list as a result of selection under ¶21-3a, ARPC [Air Reserve Personnel Center] will not report his name or the vacancy to the selection board for action. An officer in this category is promoted as follows: (1) If he is the only candidate to fill the vacancy or if none of the other candidates are on a recommended list, he will

be promoted. No further action is taken on the other candidates."

"b. The promotion of an officer in the category specified in *a* above will take place one day before the promotion of officers not on a recommended list who are selected by the selection board to fill . . . mobilization or augmentation grade vacancies." A verbatim reproduction of said *Paragraph* is set out in *Appendix B* to this petition.

7. *Air Force Manual 35-3W, Ch. 60, ¶60-5,* relating to Announcement of Selections, provides, in pertinent part, as follows: "After a report of proceedings has been approved by the Secretary of the Air Force . . . ARPC [Air Reserve Personnel Center] furnishes major commands with this information on AFRES [Air Force Reserve] officers not on EAD [Extended Active Duty]. . . . Unless otherwise instructed, commanders may immediately release the information received from . . . ARPC." A verbatim reproduction of said *Paragraph* is set out in *Appendix B* to this petition.

8. *Title 10 U.S.C. §1552,* provides, in pertinent part, as follows: "The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice . . . ".

9. *Title 10 U.S.C. §8851,* provides, in pertinent part, as follows: "After June 30, 1960, . . . an officer in the active status in the reserve grade of colonel . . . shall, 30 days after he completes 30 years of service computed under §8853 of this title or on the fifth anniversary of the date of his appointment in the grade in which he is serving, whichever is later — (1) be transferred to the retired reserve . . . ".

10. *Title 5, U.S.C. §5596(b),* provides, in pertinent part, as follows: "An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by an appropriate authority on the applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of

the pay, allowances, or differentials of the employee — (2) for all purposes, is deemed to have performed service for the agency during that period . . . ".

11. *Court of Claims Rules, Rule 149(a), Title 28 U.S.C.A.,* provides, in pertinent part, as follows: "At the request of a party or on its own motion, the court may in any case within its jurisdiction by order remand appropriate matters to any administrative or executive body or official, with such direction as may be deemed proper and just."

12. *Court of Claims Rules, Rule 131(c), Title 28 U.S.C.A.,* provides, in pertinent part, as follows: "(2) In any case, . . . the court, upon entering judgment that a party is entitled to recover, may reserve determination of the amount of the recovery for further proceedings.".

V
STATEMENT OF THE CASE

(a) *Facts Material to the Consideration of the Questions Presented.*

The petitioner is a Judge Advocate Retired Reserve Air Force Officer, holding the rank of Lieutenant Colonel, who was involuntarily retired on September 29, 1972, when he reached maximum commissioned service for retention in the Active Reserve (28 years), under the provision of *Title 10 U.S.C. §8848.*

Prior to this retirement, petitioner on June 10, 1972, filed an Application for Correction of Military Records, under the provisions of *Title 10 U.S.C. §1552,* supplemented on June 22, 1972, and on June 29, 1972, and July 3, 1972.

The Executive Secretary of the Air Force Board for Correction of Military Records, by letter dated February 23, 1973, advised the petitioner that the Board found the foregoing application failed to establish a showing of probable error or of injustice in the case presented by the petitioner.

The petitioner, by letter dated April 13, 1973, requested a reconsideration by the Air Force Board for Correction of Military Records of this unfavorable decision, on the grounds that the opinion rendered by the staff did not conform to *Air Force Manual 35-3, Ch. 23, ¶23-7,* implementing *Title 10 U.S.C. §8366(d),* as also claimed in the Application.

The Air Force Board of Correction of Military Records advised petitioner by letter dated April 24, 1973, that his application for reconsideration and hearing thereon was denied.

The petitioner, thereafter, on September 27, 1974, following continued, but futile, personal efforts in the Air Force chain of command, filed in the United States Court of Claims a petition seeking judgment against the United States directing that the Secretary of the Air Force submit his name to Congress for promotion to Colonel or, in the alternative, his name be submitted to the next Colonel promotion board for consideration and that petitioner receive all pay, allowances, rights and privileges commensurate with such grade, as set out *infra* in this petition.

The uncontested pleadings and exhibits attached thereto in the form of military records of petitioner, affidavits and Air Force orders, filed in support of petitioner's Motion for Summary Judgment, show that petitioner was selected by a promotion board that met on February 3, 1969, to be promoted to Lieutenant Colonel in the United States Air Force Reserve, that ordinarily would have been effective as an overall-vacancy promotion on April 4, 1970. An order, that is reproduced in *Appendix C* of this petition, was cut at Headquarters, Military Airlift Command, Scott Air Force Base, Illinois, directing the reserve unit to which petitioner was assigned in June of 1969, which was Charleston Air Force Base, South Carolina, to notify petitioner on June 2, 1969, of his selection which, when treated as an overall-vacancy in-sequence promotion, would have been effective as agreed and fixed by the Air Force and determined by the Court of Claims on April 4, 1970. But, if petitioner had been able to fill a Lieutenant Colonel Mobilization Augmentation Grade Vacancy after this selection and before April 4, 1970, petitioner would have been promoted earlier, that is, out-of-sequence, automatically and immediately to Lieutenant Colonel under the provisions of *Title 10 U.S.C. §8366(d),* implemented by *Air Force Manual 35-3, Ch. 23, ¶23-7.*

Headquarters, Military Airlift Command, Scott Air Force Base, Illinois, however, did not send out this overall-vacancy promotion notice to petitioner's reserve unit at Charleston Air Force Base, South Carolina, until June 10, 1969 (8 days later), and when that delayed order was received at Charleston Air Force Base, the Reserve Affairs Non-Commissioned Officer-in-Charge was on military leave that extended to after the 4th of July holidays. See *Affidavit* of Staff Sergeant (now Master Sergeant Prince Tucker), dated June 22, 1972, that is reproduced in *Appendix D* to this petition. As a result of this additional delay, petitioner was not notified of his promotion selection to Lieutenant Colonel until July 7, 1969, a week after June 30, 1969, the agreed date fixed by the Air Force and determined by the Court of Claims that petitioner must have been promoted to Lieutenant Colonel in order to be considered for promotion to Colonel by a Colonel Promotion Board that convened on July 10, 1972, prior to petitioner reaching 28 years commissioned service on September 29, 1972.

The result of these procedural delays by the Air Force was that petitioner was not reassigned to Homestead Air Force Base, Florida, until August 5, 1969, to fill an available Lieutenant Colonel Mobilization Augmentation Grade Vacancy that was being held for petitioner since May of 1969, a vacancy to which petitioner could have been transferred within two days (*Affidavit* of Master Sergeant Tucker, dated May 12, 1976, reproduced in *Appendix D)* and which would have allowed petitioner to have been promoted to Lieutenant Colonel prior to June 30, 1969. As shown in another *Affidavit* of Master Sergeant Tucker, dated December 3, 1976, reproduced in *Appendix D* to this petition, petitioner himself waited until August 1969 to be transferred to Homestead Air Force Base after the crucial June 30, 1969 date passed as a matter of choice so as to conveniently complete a portion of his remaining inactive duty training for that fiscal year at nearby Charleston Air Force Base. Petitioner resides at Savannah, Georgia, approximately 130 miles from Charleston, S. C. Homestead, Florida is approximately 600 miles from Savannah, Georgia.

Inasmuch as petitioner, therefore, was not in grade as a Lieutenant Colonel prior to June 30, 1969, and his name, consequently, was not submitted to the July 10, 1972 Colonel Promotion Board prior to petitioner reaching his 28 years com-

missioned service, petitioner was denied the opportunity to meet this Colonel Board and thus denied the opportunity of being selected for promotion to Colonel before the expiration of 28 years commissioned service that ultimately resulted in petitioner being involuntarily put in the Retired Reserve. Petitioner also was not promoted to Lieutenant Colonel until April 4, 1970 to fill an overall-vacancy in the Air Force and was thus denied promotion to and pay of a Lieutenant Colonel from June 29, 1969, to April 4, 1970, while in the Active Reserve.

The government received an *Affidavit* dated December 2, 1974, from Mr. Neil K. Hartman, Chief, Officer Promotion Branch, Promotion and Selection Division, Directorate of Personnel Actions, Air Reserve Personnel Center, Denver, Colorado, reproduced in *Appendix D* to this petition, following the filing of the petition in the United States Court of Claims, at which time the government, with the consent of the petitioner, moved the Court of Claims to suspend the proceedings in said court with the request that said proceedings be referred back to the Air Force Board of Correction of Military Records for another reconsideration of petitioner's claim (the *Motion* and *Order* thereon filed December 30, 1974, are reproduced in *Appendix A* to this petition), as this *Affidavit* recited that a Lieutenant Colonel Unit Vacancy Board (Mobilization Augmentation Grade Vacancy Board) met on June 19, 1969, and if an individual such as petitioner was on a previous list recommending that individual be promoted from Major to Lieutenant Colonel, he would have been promoted automatically, without going before the board, and that promotion would have been on June 29, 1969. A verbatim reproduction of this *Affidavit* is set out in *Appendix D* to this petition.

Thereafter, the Executive Secretary of the Air Force Board of Correction of Military Records, by letter dated April 22, 1975, again advised petitioner that the Board was not going to change its prior adverse decision against petitioner, and this suspension was then terminated by Order of the Court of Claims, filed June 23, 1975. This order is reproduced in *Appendix A* to this petition.

An amendment to the Court of Claims petition, dated June 10, 1975, was filed by petitioner to recite these new facts, discovered by the government to the effect that a Lieutenant Colonel Unit Vacancy Board (Mobilization Augmentation Vacancy Board) met on June 19, 1969, and if an individual, such as petitioner, was on a previous promotion list recommending that individual to be promoted from Major to Lieutenant Colonel, he would have been promoted automatically without going before the Board, and that promotion would have been effective one day earlier than June 30, 1969, which would have been on June 29, 1969.

Had petitioner been promoted on June 29, 1969, he would have been in grade as a Lieutenant Colonel and receiving pay as a Lieutenant Colonel from that date to April 4, 1970, when he was ultimately promoted to fill an overall-vacancy, and he also would have been in grade for the required period that would have made him eligible for consideration for promotion to Colonel by the July 10, 1972 Colonel Promotion Board prior to petitioner reaching his 28 years commissioned service on September 29, 1972, that otherwise would require (and did result in) petitioner's forced retirement as a Lieutenant Colonel.

The record in this case shows that the Officers Efficiency Reports (OERs) written on petitioner were the highest a Lieutenant Colonel could receive, with these OERs having additional endorsements by the Commanding General at Charleston Air Force Base and the Wing Commander at Homestead Air Force Base, specifically recommending petitioner, without qualification, for promotion to Colonel. In addition, Headquarters, USAF, directed a Special OER to be written on petitioner in July 1972, on the premise that the records of the petitioner were going to be corrected administratively at the Air Force Reserve Personnel Center, Denver, Colorado, so as to allow petitioner to meet the July 10, 1972 Colonel Promotion Board.

The Air Force Reserve Personnel Center, however, determined that only the Air Force Board for Corrections of Military Records could make this correction, and since this consideration by that board did not take place prior to petitioner reaching 28 years commissioned service, petitioner was then put in the Retired Reserve.

The petitioner contends that this injustice, that constituted legal error, caused by the procedural delay of the Air Force in notifying him of his selection for promotion to Lieutenant Colonel can only be corrected by the entire matter being remanded to the Secretary of the Air Force for corrective action, that would include compensating petitioner for the difference of pay between a Major and a Lieutenant Colonel during the period of June 29, 1969, and April 4, 1970, when petitioner should have been serving in the Active Reserve as a Lieutenant Colonel, with petitioner's name then being submitted to a Special Selection Board to be convened *(an alternative suggested by the government to the Court of Claims)* to consider whether petitioner would have been promoted along with his contemporaries by the July 10, 1972 Colonel Board but for the delay in his being notified on June 2, 1969 of his placement on a recommended overall-vacancy list for promotion to Lieutenant Colonel since, had this delay not have taken place, petitioner would have been promoted to Lieutenant Colonel on June 29, 1969, thereby also making him eligible for promotion consideration by the July 10, 1972 Colonel Promotion Board prior to his reaching 28 years commissioned service, which constituted legal error, as petitioner was not immediately notified, as required when permission to give this notice was given under the provision of *AFM 35-3, Ch. 60, ¶60-5,* and with the Secretary being directed to compensate petitioner as Colonel for all pay and allowances from the date petitioner would have been promoted, and further directing that petitioner be ordered back to Active Reserve for a period of 5 years as Colonel following any such promotion, under the statutory provisions of *Title 10 U.S.C. 8851.*

Petitioner further contends this Specially Constituted Selection Board should be given the opportunity to consider promoting petitioner to Colonel by reason of this legal error.

(b) *Basis for Federal Jurisdiction in the Court of First Instance.*

The jurisdiction of the Court of Claims was invoked, and not denied by the respondent, under the provisions of *Title 10 U.S.C. §1491; Title 10 U.S.C. §1552; Court of Claims Rules, Rule 149(a) and Rule 131(c) (2), Title 28 U.S.C.A.*

VI
ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

The decision below should be reversed for the special and important reason that it encroaches upon the right of petitioner to have been paid as a Lieutenant Colonel for the period of June 29, 1969, to April 4, 1970, while in the Active Reserve and to have remained in the Active Air Force Reserve and the opportunity to have been promoted and paid in the successive grades for which he was qualified, as this decision was not decided in the way that is in accord with applicable decisions of this court and is in conflict with these applicable decisions of this court, so as to call for an exercise of this court's power of supervision. The specific character of these reasons to be considered are as follows:

The Writ of Certiorari should be granted in this case, just as was done in the *Testan* case, *supra,* because of the importance of the issue in the measure of the Court of Claims' statutory jurisdiction and because of the significance of that court's decision upon the administration of boards for the correction of military records, as the Court of Claims in the present case did not follow the clear mandate of the Supreme Court directing that review of such administrative findings must be limited to legal entitlement, or legal error in connection with such review, rather than determining whether the administrative finding was arbitrary, capricious or against the substantial weight of evidence.

Furthermore, the petitioner contends that the Supreme Court should grant the Writ of Certiorari to review the decision of the Court of Claims, as there is no other appellate forum to which the petitioner can appeal, and the denial of the Writ would be a denial of the petitioner the equal protection of laws and due process, in that had the petitioner filed his action in a District Court, rather than the Court of Claims, he would have been able to appeal the District Court's decision to a Circuit Court of Appeals prior to applying for the Writ of Certiorari to the Supreme Court.

1. *Petitioner had a legal right to have been considered for promotion prior to discharge.*

Title 10 U.S.C. §8366(d), implemented by *Air Force Manual 35-3, Chapter 23,* provides the method for early automatic promotion of officers already on a recommended list.

The Court of Claims misapprehended and mistakenly interpreted both of these authorities by holding that *Title 10 U.S.C. §8366(d)* only provides that the Air Force "may," authorize out-of-sequence promotions, without recognizing the mandatory provisions of the implementing *Manual* (that has the same effect as a Regulation), and by mistakenly holding that plaintiff argued that *Chapter 23* of the *Manual* did not apply to him, whereas the contrary is the case.

Chapter 23 of *Air Force Manual 35-3,* provides for a "self-executing promotion." Petitioner was "already on a recommended list" as a result of his previous Overall-Vacancy Selection Board action, and under *¶23-7a* of this *Manual,* when an officer is on a recommended list "ARPC [Air Reserve Personnel Center] *will not* [mandatorily] report his name or the vacancy [to be filled by that officer already on a recommended list] to a selection board for action." Furthermore, if petitioner was the "only candidate," under *§(1) of Chapter 23¶ 23-7a,* to fill the vacancy, if none of the other candidates are on a recommended list, "he *will be* [mandatorily] promoted."

The petitioner here was not only an "only candidate," but on August 5, 1969, he was actually filling the Lieutenant Colonel Mobilization Augmentation Vacancy at Homestead Air Force Base - that he would have filled in June, 1969, prior to the Unit Vacancy (Mobilization Augmentation Grade Vacancy) Selection Board that met on June 19, 1969, had he been notified of his selection for promotion to lieutenant colonel, as he should have been on June 2, 1969, as all arrangements had been made for his immediate transfer from Charleston Air Force Base to Homestead Air Force Base on said date to permanently fill this lieutenant colonel vacancy, as established by the *Affidavits* of Master Sergeant Tucker dated June 22, 1972, May 12, 1976, and December 3, 1976, reproduced in *Appendix D* to this petition, and the *Statements* of Lieutenant Colonel Stanley Kava, then the Staff Judge Advocate at Homestead Air Force Base, dated June 24, 1972, and June 29, 1972, also reproduced in *Appendix D* to this petition.

Under these circumstances, pursuant to *¶23-7b* of *Chapter 23* of the *Manual,* petitioner would have been promoted "one day before the promotion of other officers not on a recommended list who are selected by a selection board to fill Unit or Mobilization Augmentation Grade Vacancies." That date would have been June 29, 1969, as confirmed by the *Affidavit* of Mr. Neil Hartman, *supra,* reproduced in *Appendix D.* This paragraph makes it clear that an officer "on a recommended list" *is not to be considered by the board or selected by the board to fill such vacancies.* Only officers who are seeking the vacancy promotion *along with other officers,* will be considered by the board, which was not the case with petitioner. The Court of Claims' decision, however, also holds that since *¶23-7a* of *Chapter 23* of the *Manual* refers to officers being "recommended for promotion," and since petitioner was not recommended for promotion prior to June 29, 1969, he could not be automatically promoted; however, it is clear that this recommendation mentioned is *only* required for *candidates* seeking an out-of-sequence promotion in competition with *other* officers. An officer who is already on a recommended list as a result of selection for promotion by an earlier Overall-Vacancy Board would not have to be recommended again for promotion by a board that *he will not meet.* If he will not meet the board, as provided in *Chapter 23 ¶23-7* of the *Manual,* then no recommendation would go to the board when *neither* "his name or the vacancy" is reported to this board, and he, therefore, would be promoted automatically under the provisions of *Chapter 23 ¶7b* of the *Manual,* one day before the officers *who were selected* by this board *who were not* on a recommended list. The Court of Claims mistakenly emphasized that the petitioner would not have had this recommendation, that the Court of Claims held petitioner should have had 30 days prior to the meeting of the board on June 19, 1969, since petitioner could not have been notified of his selection for promotion to Lieutenant Colonel prior to June 2, 1969, as authorized in and required by the directive from Headquarters Military Airlift Command, *supra,* reproduced in *Appendix D,* (this order, as noted was not mailed until June 10, 1969, thereby setting into motion the delay of the notification of petitioner of his name being on the recommended list that prevented petitioner from being assigned to Homestead Air Force Base in the Lieutenant Colonel Mobilization Augmentation Grade Vacancy prior to June 19, 1969). This 30-day period is not a part of *Chapter 23* that applies to petitioner, as

Chapter 23 ¶ 23-4, relating to *"How to Fill a Vacancy,"* refers to *Table 23-1,* reproduced verbatim in *Appendix B* to this petition, that sets out the *Rule* regarding promotion of officers *that must be recommended* for promotion. The 30-day period is not a part of the *Rule,* in any event; it is merely a procedural direction set out in a *"Note"* below the table. The *Note* is not identified as being part of any of the rules enunciated in the *Table;* nor is it a part of any of the paragraphs of *Chapter 23.* However, it is emphasized that neither the *Rule* set out in *Table 23-1,* nor the procedural *Note* relating to the 30-day period apply to the petitioner, who "was already on a recommended list" and whose name *would not have been* "reported to the board for action" on the Lieutenant Colonel vacancy that he would have filled immediately after June 2, 1969, but for the delay (legal error) in notifying petitioner of his recommendation for promotion to Lieutenant Colonel. Nevertheless, this direction specifically does state a "recommendation (that would include merely submitting an officer's name to ARPC and whose name would not have been acted upon by this specific board) may be submitted [to ARPC] *at any time."* This clearly means that notwithstanding the *Note* that a name be submitted no later than 30 days before the board is scheduled to convene, a name, that would include an officer already on a recommended list, can be submitted *"at any time"* within this 30-day period (or even after this board meets), just so long as it is done before the promotion of officers not on a recommend list who are selected by the selection board to fill Unit or Mobilization Augmentation Grade Vacancies. (AFM 35-3, Chap. 23 ¶ 23-7b). The *Affidavit* of Mr. Hartman, *supra,* in *Appendix D,* dated December 2, 1974, states: ". . . any Major *selected* by this board [Unit or Mobilization Augmentation Grade Vacancy Board that met on June 19, 1969], would have been promoted effective 30 June 1969. If an individual was on a *previous list* [as was the petitioner, who was selected by the February, 1969, Overall-Vacancy Promotion Board], he *would have been* promoted *'automatically,' 'without going before the board'* [the June 19, 1969, Lieutenant Colonel Unit Vacancy or Mobilization Augmentation Grade Vacancy Board], and that promotion would have been effective one day earlier, which would have been 29 June, 1969." It will be remembered that the *government* asked the Court of Claims, after receiving the *Hartman Affidavit,* to suspend the proceedings in this case to allow the Air Force to reconsider its denial of petitioner's application

for correction of his records. *(Motion* and *Order, supra,* in *Appendix A).*

The above *Note* then continues by stating that these recommendations apply to "an officer *to be considered* by this specific board" convened to fill Unit or Mobilization Augmentation Grade Vacancies. *Papragraph 7a(1)* of *Chapter 23* of the *Manual* supports this interpretation, since ¶ *7a* states that ARPC *"will not* report his name or the vacancy to a board for action," that is, the name of an officer who is already on a recommended list as a result of previous selection by an Overall-Vacancy Board, such as petitioner. *Section (1)* of ¶ *23-7a* of *Chapter 23* of this *Manual,* goes on to state that when this officer, who is already on a recommended list, is the only *candidate* to *fill* the vacancy *"he will be promoted,"* again without consideration by this specific selection board, notwithstanding the 30-day period, since his name can be submitted *"at any time"* prior to the period specified in ¶ *23-7b* of *Chapter 23* of the *Manual.*

The two promotion *Methods "A"* and *"B"* outlined in the opinion of the Court of Claims do not apply to petitioner for the above reasons; and the *Affidavits* filed in support of petitioner's Motion for Summary Judgment showing to the contrary were not opposed or rebutted in any way. Furthermore, *Footnote 6* of this opinion that purports to support the lower court's contention that petitioner is "piling" and "pyramiding" "inference upon inference" as there is no way of knowing if petitioner could have been placed on the recommended list for promotion to Colonel and thereby spared automatic retirement, overlooks the fact that petitioner would have been promoted out-of-sequence to Lieutenant Colonel automatically on June 29, 1969, had he been notified on June 2, 1969, of his selection by the February 3, 1969 Overall-Vacancy Lieutenant Colonel Board, and then petitioner would have been considered for promotion by the Colonel Board on July 10, 1972. Under the *Remand Statute Title 10 U.C.S. §1491,* the question of whether petitioner would have been promoted to Colonel by the July 10, 1972, Colonel Board then should be referred back to the Secretary of the Air Force for action in a manner that will not violate the rulings in *Yee v. United States,* 206 Ct. Cl. 388, 399, 512 F. 2d.1383, 1388, and *Brenner v. United States,* 202 Ct. Cl. 678, Cert. denied, 419 U.S. 831. In fact, under the *Yee* case, which was a "passover" case not directly applicable to this case, the court held the claimant must

plead and prove that the Selection Board violated a statute or regulation governing its procedures, and if so, the claimant would prevail on the theory that he never had been discharged. This petitioner agrees with this proposition only on the basis that the Colonel Board convened on July 10, 1972, should have considered this petitioner for promotion along with his contemporaries then existing, but did not because petitioner was illegally (contrary to *Statute* and *Regulation/Manual)* denied promotion to Lieutenant Colonel on June 29, 1969, and therefore he should not have been discharged from the Active Reserve without having first met the July 10, 1972 Colonel Board.

2. *The Court of Claims erroneously determined this case on the basis of whether the Air Force Board for Correction of Military Records acted arbitrarily, capriciously, or against the substantial weight of evidence rather than on basis of legal error.*

The *Tucker Act,* codified in *Title 28 U.S.C. §1491,* along with *Title 10 U.S.C. §1552* and *Court of Claims Rules, Rule 131(c)* and *Rule 149(a), Title 28 USCA,* establishes the jurisdiction of the Court of Claims in cases founded on any regulation of an executive department, or founded on any express or implied contract with the United States, and in an original suit for a money judgment to recover lost pay. See: *Friedman v. United States,* 158 F. Supp. 354; 141 Ct. Cl. 239, cited in the *Duhon* case, *infra.* Judge Littleton speaking for the Court of Claims emphasized the jurisdiction of the Court of Claims to review an adverse action of a Board for the Correction of Military Records by stressing that: ". . . the sort of 'review' contemplated in an action to recover lost pay is an original suit for a money judgment . . . [S]uch 'reviews' by this court to determine whether or not pay has illegally been withheld from a member or former member of the military services, have long been sanctioned by this court and the Supreme Court." (p. 258-259). Also see: *Dismuke v. United States,* 297 U.S. 167, 56 S.Ct. 400, 80 L.Ed. 561 (1936); *Reynolds v. United States,* 292 U.S. 443, 54 S. Ct. 800, 78 L.Ed. 1353 (1934); *Spencer v. United States,* 102 F. Supp. 774, 121 Ct .Cl. 558, cert. denied, 344 U.S. 828, 73 S. Ct. 29, 97 L. Ed. 644 (1952); *Shapiro v. United States,* 69 F. Supp. 205, 107 Ct. Cl. 650 (1947).

In *Friedman* the court further stated: ". . . that Congress had no intention in enacting the Correction Board legislation of withholding from this court jurisdiction to render a money judgment for pay of which a claimant is deprived by reason of . . . illegal action of a Correction Board in either wrongfully refusing to correct the record, or wrongfully refusing to order payment of amounts due on account of a proper correction made by the Board." (p. 376 in 158 F. Supp., and p. 259 in 141 Ct. Cl.). See also: *Prince v. United States,* 119 F. Supp. 421; 127 Ct. Cl. 612; and, 41 *Op. Att'y Gen.* 94 (1952).

The Petitioner, as a Reserve Commissioned Officer, periodically (every two-three-four or five years at the option of the Reservist) renewed his contract to serve in the Active Reserve, which subjected him to immediate recall to active duty in a national emergency; and this reserve duty, in turn, availed petitioner of the right to be promoted from time to time under the provisions of law that are implemented by *Air Force Regulations* and *Manuals.* These promotions, again in turn, entitled petitioner to increased pay and allowances which constitutes a substantive right that, incidentally, did not exist in the *Testan* case. The petitioner is suing for monies improperly retained under circumstances that mandate compensation by the federal government because of both his wrongful promotion denial and wrongful discharge from the Active Reserve as a result of legal error of the government.

The petitioner is entitled to the emoluments of the position he held, or to which he had a right to advance, until he had been legally disqualified, as stated in the case of *Selman v. United States,* 204 Ct. Cl. 675, 498 F.2d. 1354 (1974), cited in the *Testan* case. The pay claim of the petitioner here rests flatly upon the mandatory provisions of *Air Force Manual 35-3,* implementing *Title 10 §8866d,* requiring that petitioner would have been promoted automatically to Lieutenant Colonel on June 29, 1969, had he been immediately notified on June 2, 1969, of his promotion as directed by Headquarters, Military Airlift Command, as also required by *Chapter 23,* of that *Manual.*

The case of *Doggett v. United States,* 207 Ct. Cl. 478, 483 (1975) also cited by the lower court to support its findings, in fact supports the contention of the petitioner, in that the lower court held that it would award pay above the pay of the

position a person actually occupies if he shows "a clear-cut legal entitlement to the pay of the office to which he claims he should be promoted." Citing: *Selman v. United States, supra.* The "clear-cut" legal entitlement of petitioner to have been promoted to Lieutenant Colonel on June 29, 1969, is clear-cut. The *Selman* case held the "unambiguous wording of a statute [or implementing manual] should be given its plain and commonly understood meaning." Also see in this regard: *Skaradowski v. United States,* 200 Ct. Cl. 488, 471 F.2d. 627. Furthermore, the *Doggett* case turned on the proposition that the promotion sought there was "discretionary" upon a recommendation of his commanding officer" that could be withdrawn. The facts in *Doggett* are clearly distinguished from the present case sought to be reviewed.

Then, one of the cases that the lower court asked to be compared with the *Doggett* case, namely: *Duhon v. United States,* 198 Ct. Cl., 564, 461 F.2d. 1278, is completely analagous to and on all fours with the claim of the petitioner. The Air Force in the *Duhon* case failed to advise Major Duhon of essential information regarding his promotion status that resulted in Major Duhon being eliminated from active status, just as was done with the petitioner here. The failure to notify admittedly was not the fault of Major Duhon, just as the failure to notify petitioner here was not the fault of this petitioner. At the time this petitioner's career "had been moving along at a steady pace," he having "advanced regularly," "suddenly a simple error on the part of the government, a little mistake, destroys his career." (p. 1280). As in the *Duhon* case, the Air Force Board for Correction of Military Records quite easily could have corrected petitioner's records, and "an obvious injustice created totally by an error of the defendant was not corrected by the appropriate military board, which had the power to do so." (p. 1281). Retired Mr. Justice Reed was cited in the *Duhon* case at page 1282, as saying: "The correction boards were created to remedy wrongs, not to confound them." *Eicks v. United States,* 172 F. Supp. 445, 145 Ct. Cl. 527. The the court in the *Duhon* case quoted Judge Madden in *Betts v. United States,* 172 F. Supp. 450, 145 Ct. Cl. 530, as saying: "It becomes a question whether the plaintiff should forfeit and lose valuable rights because of the inaction of the official who had those rights in his custody . . . " Similarly, in this case, as in the *Duhon* case, "plaintiff has suffered because of an error made solely by the Air Force."

Finally, the Court of Claims stated in the *Duhon* case that: "We have previously held that a 'Secretary and his boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief.' " *Caddington v. United States,* 170 F. Supp. 604, 607; 147 Ct. Cl. 629, 634.

The *Back Pay Act* codified in *Title 5 U.S.C. §5596(b),* also discussed in the *Testan* case, authorizes retroactive recovery of wages whenever a federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal . . . of all . . . of the compensation to which the employee is otherwise entitled." This court held that the statute's language is intended to provide a monetary remedy for wrongful removals and "other unwarranted or unjustified actions affecting pay allowances that could occur in the course of reassignments . . . " (in the Active Reserve and to the Retired Reserve), thereby creating a claim for the award of money damages "for wrongful deprivation of pay . . . " as a result of the claim that petitioner " . . . should have been placed in a higher grade."

Consequently, the Court of Claims failed to follow the directions enunciated in the *Testan* case, that claims, such as the present one, should be determined on the basis of legal entitlement rather than whether the administrative board from which the petitioner appeals acted arbitrarily, capriciously or against the substantial weight of the evidence. The mandate from this court to do otherwise in such cases is clear.

The petitioner had a substantive legal right to be promoted to Lieutenant Colonel on June 29, 1969, and would have been promoted to Lieutenant Colonel but for the failure of the government to comply with its Manual implementing the law authorizing petitioner's promotion at that time. The petitioner by reason of this substantive right that was denied also had a substantive legal right under statute to have been considered for promotion to Colonel by the Colonel Promotion Board that convened prior to his reaching 28 years commissioned service which was denied petitioner because of the failure of the Air Force to comply with the mandatory provisions contained in its own Manual implementing the statute authorizing the promotion of petitioner to Lieutenant Colonel on June 29, 1969.

The Court of Claims therefore should have determined this case on the basis of whether or not there was "legal error" by the Air Force in not complying with its own Manual implementing statutory authority, and not whether the Air Force and the Air Force Board for Correction of Military Records acted arbitrarily or capriciously or against the substantial weight of the evidence. The *Testan* case limits the review of the Court of Claims to whether a "substantive right" to the remedy claimed exists. (Div. III p. 126). Whether or not the Administrative Correction Board acted arbitrarily, capriciously or against the substantial weight of evidence is not the issue; whether or not the petitioner had a "substantive legal right" to the position and pay he claims is the issue. The rest is immaterial and under the holding of the *Testan* case no longer the standard of review of actions of such administrative boards. Whether this board acted arbitrarily, capriciously or against the substantial weight of the evidence does not create a cause of action against the government, but whether it is the legal right to the relief sought that creates this cause of action as determined in the *Testan* case.

The arbitrary or capricious rule or a finding that was against the substantial weight of evidence only applies in cases where there is an issue of fact to be determined, not where the sole issue is the application of law to acknowledged facts such as should have been done in this summary judgment proceeding where none of the facts set out in the supporting documents and affidavits were refuted. But to the contrary no affidavits or documents opposed the affidavits and documents filed in support of petitioner's motion for summary judgment, were filed by the government. In fact, all of the facts surrounding the occurrences relating to the claim of petitioner were expressly admitted, thus leaving the substantial legal right of the petitioner to the claims made as the sole issue that should have been determined by the Court of Claims.

VII
CONCLUSION

For the foregoing reasons the decision below is palpably erroneous and should be reversed with directions: 1) that judgment be entered awarding petitioner the additional pay due him as a Lieutenant Colonel from no later than June 29, 1969, to August 4, 1970, when petitioner continued to serve as a Major when he should have been serving as a Lieutenant Colonel in the Active Air Force Reserve; 2) that an order be issued directing that petitioner be restored to the Active Reserve and placed in an appropriate duty status with correction of his applicable records in order to complement the relief afforded by a money judgment so that petitioner may meet the next Colonel Promotion Board convened by the Air Force since petitioner was wrongfully removed from the Active Reserve without meeting the Colonel Board that met prior to his removal that he had a legal right to have met, with directions that this Colonel Promotion Board be fully appraised as to the reasons for the delay in the submission of petitioner's name for consideration for promotion to Colonel and that petitioner not be prejudiced in any way be reason of this delay caused by error on the part of the Air Force, or in the alternative, that the claim of petitioner then be remanded to the Secretary of the Air Force under the provisions of the *Remand Statute,* codified in *Title 28 U.S.C. §1491,* and implemented by *Rule 149(a)* of the Court of Claims, for further consideration, either by the Secretary, or by a specially constituted selection board, to determine if petitioner would have been promoted along with his contemporaries at that time; and, 3) with further directions that should the Secretary, or this board, find that petitioner would have been promoted to Colonel, either order that petitioner be paid and reinstated in the Active Reserve as a Colonel, or order that the said case be returned to the Court of Claims for a subsequent order directing that petitioner be paid and reinstated in the Active Reserve as a Colonel from the date officers selected by the July 10, 1972, Selection Board were promoted, and in either case, providing that said reinstatement must be for a period of no less than five (5) years, pursuant to statute controlling the status of petitioner. *Court of Claims Rules, Rule 131(c) (2), 28 USCA.*

The reversal of the Court of Claims' decision in this case is appropriate to be consistent with this court's practice where the

law is settled by a prior decision *(Testan)* and also where the action of a lower court is clearly improper.

Respectfully submitted,

JOSEPH B. BERGEN
Attorney for Petitioner

Columbia Square Law Offices
125-127 Habersham Street
Savannah, Georgia 31401

Telephone: 912/233-8001

Of Counsel:
Jack E. Miller
122 East Oglethorpe Avenue
Savannah, Georgia 31401

Telephone: 912/233-4141

Appendix "A"

In the United States Court of Claims

No. 356-74

(Decided April 20, 1977)

LT. COL. JOSEPH B. BERGEN v. THE UNITED STATES

Joseph B. Bergen, pro se. Jack E. Miller, of counsel.
John W. Showalter, with whom was Assistant Attorney General Rex E. Lee, for defendant.

Before Skelton, Kashiwa, and Kunzig, *Judges.*

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Kunzig, *Judge,* delivered the opinion of the court:

This military pay case comes before the court on crossmotions for summary judgment. Plaintiff (a former Air Force Reserve Lieutenant Colonel retired from the Judge Advocate General's Department) argues that the Air Force Board for the Correction of Military Records (AFBCMR) improperly denied his claim that he was entitled to an "automatic" out of sequence promotion to Lieutenant Colonel. Defendant contends that the AFBCMR acted neither arbitrarily nor capriciously nor against the substantial weight of the evidence in refusing to grant plaintiff's application and should, therefore, be affirmed.

Plaintiff's claim must fail. Although the decision is not an easy one, and was reached only after supplemental briefing was requested from both parties, no other result is possible. Plaintiff has not shown that he meets the governing requirements set forth in Air Force Manual (AFM) 35-3, Chapter 23 (hereinafter Chapter 23) for an out of sequence promotion to fill a "unit and mobilization augmentation grade vacancy."

Plaintiff is seeking to have his promotion to Lieutenant Colonel moved from April 4, 1970 to some time prior to July 1,

1969. Unless plaintiff was promoted to Lieutenant Colonel before July 1, 1969, he could not be considered (and possibly promoted) by a Colonel Selection Board which met on July 10, 1972, due to plaintiff's insufficient time in rank as Lieutenant Colonel. 10 U.S.C. § 8363(a) (1970); AFM 35-3, Ch. 21-3(c). The promotion to Colonel in July 1972 was crucial for plaintiff, for unless promoted by September 1972, he became subject to automatic retirement under 10 U.S.C. § 8848 (1970) (28 years of service without selection for rank of Colonel). Plaintiff was in fact automatically retired for this reason.

Basically, plaintiff claims that but for the delay in notifying him of his placement on a recommended list for promotion to Lieutenant Colonel, he would have been promoted to Lieutenant Colonel before July 1, 1969, thus avoiding his ultimate automatic retirement for failure to make full Colonel within the requisite time period. Plaintiff relies principally on 10 U.S.C. § 8366(d) (1970), and supporting affidavits of persons involved in the promotion process. The Government, too, relies on 10 U.S.C. § 8366(d) (1970), but asserts that the application of this section can only be determined through an examination of its implementing regulations found in the Air Force Manual, Chapter 23. Plaintiff, in reply, argues that Chapter 23 does not apply to him, but that if it does, he has met its requirements.

We conclude that the dispositive issue in this case is whether plaintiff met the requirements of Chapter 23 for an "automatic," out of sequence promotion, so that he should have been promoted prior to July 1, 1969.[2] We reach this conclusion for two reasons. First, the language of 10 U.S.C. § 8366(d) (1970), on which plaintiff relies, is not self-executing;[3] it is effectuated only by its implementing regulations (inartfully drawn though they may be). Second, plaintiff's affiants, while perhaps evidencing views somewhat divergent from the regulations, do not control the regulations, but are governed by them.

Chapter 23 delineates two methods by which plaintiff could achieve an "automatic," out of sequence promotion. Although plaintiff argues only the first, in fairness to this *pro se* plaintiff, we shall analyze each method in turn.

To qualify for promotion under method A, plaintiff must meet three requirements at issue here:

(1) His name must be on a recommended list for promotion to Lieutenant Colonel;

(2) He must be filling the vacancy slotted for the higher rank; and

(3) He must also be recommended for promotion to Lieutenant Colonel by the commander of the unit having the vacancy.

All of these requirements must be met at least *thirty days* prior to the meeting of the appropriate selection board. If all the requirements are satisfied prior to the thirty-day cut-off date, then the officer is "automatically" promoted without having to go before the selection board, and the selection is effective one day before those of officers promoted by the selection board. AFM 35-3, Ch. 23-7(b).

Applying the facts of the instant case to the requirements of method A, we find that plaintiff satisfied the conditions, *but not by the cut-off date.* In plaintiff's case, the cut-off date was May 20, 1969, thirty days before the meeting date of the June 19, 1969 selection board.[4] Promotions made by the June 19 selection board were effective June 30, 1969. Plaintiff, if he had satisfied the necessary requirements by May 20, would have been promoted effective one day earlier, or June 29, 1969. AFM 35-3, Ch. 23-7(b).

Examining the three requirements in reverse order, the facts show that plaintiff was not recommended for promotion by the commander of the unit having the vacancy until December 1969. Even though the unit commander stated by affidavit that he would have recommended plaintiff in June 1969, a recommendation in June would still not salvage plaintiff's case. Under no construction of the facts could plaintiff have been recommended by May 20, 1969.

Turning to the second requirement, the facts again illustrate that plaintiff was too late. He did not fill a vacancy slotted for a Lieutenant Colonel until August 5, 1969. The fact

that the position was available in June and that plaintiff might have received assignment to it in June does not change our result. Nothing in the record shows that the vacancy was available in May, or, even if it was, that plaintiff would have known about it or would have been assigned to it by May 20.

The first requirement is that plaintiff had to be on a recommended list for promotion to Lieutenant Colonel by the May 20, 1969 cut-off date. Whether plaintiff met this requirement gives us some difficulty. Plaintiff was placed on a recommended list on February 3, 1969. However, this list, which contained instructions for notification of the named officers, was not released until June 2, 1969. It appears then that the operative date plaintiff was placed on the recommended list was June 2. At any time from February 3 to June 2, plaintiff's name possible could have been removed by the Secretary of the Air Force.

We note that plaintiff did not meet either the second or third requirements by the proper date. This alone defeats plaintiff's claim for promotion. It is, therefore, unnecessary for us fully to analyze the first requirement—whether plaintiff was on the recommended list by the cut-off date. We hold plaintiff failed timely to meet requirements (2) and (3). Taking into consideration the incomplete briefing on requirement (1), we decline to reach it.

At this juncture, then, we have seen that plaintiff was three and six months late in satisfying necessary requirements of method A to reach "automatic" promotion. Although plaintiff fails to argue the second possible method (method B), we nevertheless now examine the requirements to see if, by any possible interpretation, plaintiff somehow qualifies.

This alternative method states three pertinent requirements that must be met by the May 20, 1969 cut-off date:

(1) Plaintiff's name must be on a recommended list for promotion to Lieutenant Colonel;

(2) If not occupying the vacancy slotted for the higher rank, he must either be

"assigned to the same Reserve section as the unit having the vacancy. (If the vacancy is in a unit, the officer must

be assigned to that organization. If a mobilization augmentation position vacancy . . . exists, he must be assigned to the MAJCOM having the vacancy);" or

"[a]n officer whose application for assignment to a unit having the vacancy has been approved but whose assignment has not yet been effected." AFM Chapter 23-2(a) (2) & (3)

(3) He must have been recommended for promotion to Lieutenant Colonel and to the slot by the commander of the unit having the vacancy.

The requirements are slightly different from those discussed in method A, *supra*. Yet plaintiff fails to meet these requirements for "automatic" promotion for the same reason he failed to meet the requirements of method A: He was too late. He met neither the second nor the third requirement by May 20, 1969. He was assigned to the unit having the Lieutenant Colonel vacancy at the same time that he was assigned to the vacancy itself—August 1969, almost three months after the cut-off date. He was not recommended for promotion to Lieutenant Colonel until December 1969, some six months after May 20, 1969.

Plaintiff, however, argues that but for the delay from June 2, 1969 to July 7, 1969 in his being notified that he was on the recommended list, he "would have met the requirements for 'automatic' promotion." This argument lacks viability. That plaintiff could somehow satisfy two requirements by May 20, 1969 when, by his own admission, he had no reason to try to meet these requirements until after June 2, 1969 (three weeks subsequent to May 20, 1969), illustrates the lack of merit in plaintiff's claim. We are left with a piling of inference upon inference, devoid of factual support. Even if this court were in the promotion business, which it has repeatedly said it is not,[5] we would be hard-pressed to find a solid link in plaintiff's chain of "ifs."[6] One clear fact remains: He did not meet the appropriate requirements in time.

Simply put, plaintiff has not shown that the AFBCMR, in denying his application for change in the date of his promotion to Lieutenant Colonel, acted arbitrarily, capriciously, or against the substantial weight of the evidence. *Compare Doggett v. United States,* 207 Ct. Cl. 478, 483 *(1975); with Yee v. United*

States, 206 Ct. Cl. 388, 397, 512 F.2d 1383, 1387 (1975); *Skaradowski v. United States,* 200 Ct. Cl. 488, 471 F.2d 627 (1973); *Duhon v. United States,* 198 Ct. Cl. 564, 461 F.2d 1278 (1972).

In summary, in order for plaintiff to qualify for so-called "automatic" promotion, he had to meet the requirements of Chapter 23. Even with a pyramiding of inference upon inference which sorely taxes the imagination, he failed.

Accordingly, upon consideration of the briefs (original and supplemental) and record, and after hearing oral argument, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and the petition is dismissed.

1 Prior to June 25, 1969, "Promotion to USAFR to Fill Unit and Mobilization Augmentation Grade Vacancies" was found at AFM 35-3, Chapters 60-62. The regulations were amended effective June 25, 1969. As no difference (material to this case) is found between the pre- and post-June 25, 1969 regulations, all references will be to the post-June 25, 1969 version.

2 As discussed *supra,* July 1, 1969 is plaintiff's "magic day." Unless the court finds he should have been promoted to Lieutenant Colonel before this day, his further claim for promotion to Colonel (assuming the court would order promotion, but *see Doggett v. United States,* 207 Ct. Cl. 478, 482 (1975)) fails, as plaintiff would not have spent three years as a Lieutenant Colonel prior to the Colonel Selection Board's July 1, 1972 cut-off date. 10 U.S.C. § 8363(a) (1970); AFM 35-3, Ch. 21-3(c). Because July 1, 1969 is plaintiff's "magic day," it is not necessary to discuss plaintiff's possible promotion to Lieutenant Colonel on any date subsequent to June 30, 1969. (April 4, 1970 was the actual date of plaintiff's promotion to Lieutenant Colonel.)

3 10 U.S.C. § 8366(d) (1970) states, in pertinent part:
An officer whose reserve grade is . . . major and whose name is on a recommended list *may* be promoted at any time to fill a vacancy . . . (emphasis supplied)

Plaintiff argues that, in this section, "may" equals "shall" with the result that any Major on a recommended list who is filling a vacancy is, without more, to be "automatically" promoted. Not only does such a reading do violence to the plain meaning of the section, *Selman v. United States,* 204 Ct. Cl. 675, 680, 498 F.2d 1354, 1356 (1974), but it also would destroy an orderly promotion process. Contrary to plaintiff's position, when something "may" be done, it invites regulations to fill out the conditions by which the act is to be done. "May," unlike "shall," is not a word of command, but of permission.

4 The Government suggests that May 19 is the thirty-day cut-off date. Our calculation indicates May 20. However, the difference between defendant's date and our own is not material. As defendant does not explain its method of calculation, we use our own.

5 *See, eg., Yee v. United States,* 206 Ct. Cl. 388, 399, 512 F.2d 1383, 1388 (1975); *Brenner v. United States,* 202 Ct. Cl. 678 (1973), *cert. denied,* 419 U.S. 831 (1974).

6 We note that even if plaintiff had been promoted to Lieutenant Colonel in time to be considered by the July 1972 Colonel Selection Board, we have no way of knowing (and, we might add, neither does plaintiff) if plaintiff would have been placed on the recommended for promotion list by the board and thereby spared automatic retirement.

Appendix "A"

IN THE UNITED STATES
COURT OF CLAIMS
No. 356-74
(Filed Dec. 26, 1974)

LT. COLONEL JOSEPH B. BERGEN,
Plaintiff,

V.

THE UNITED STATES,
Defendant.

DEFENDANT'S MOTION TO SUSPEND PROCEEDINGS

Defendant respectfully moves the Court to suspend proceedings in this case for a reasonable period in order to allow plaintiff to make application to the Board for the Correction of Military Records. In the course of preparing defendant's response to plaintiff's petition, defendant has been made aware of certain information that was not known to either plaintiff or to the Board when plaintiff made his original application. This information relates to the existence of a Unit Vacancy Board.

Defendant's counsel is authorized to state that plaintiff concurs in this motion. Defendant is presently forwarding the information to plaintiff who, upon receipt of said information, will make application to the Correction Board.

For the foregoing reasons, defendant respectfully requests this Court to suspend proceedings in this case for a reasonable period in order to allow plaintiff to make application to the Correction Board.

Respectfully submitted,

CARLA A. HILLS
Asistant Attorney General
Civil Division

JOHN W. SHOWALTER
Attorney, Civil Division
Department of Justice

IN THE UNITED STATES
COURT OF CLAIMS

TRIAL DIVISION

No. 356-74

(Filed December 30, 1974)

LIEUTENANT COLONEL JOSEPH B. BERGEN

v.

THE UNITED STATES

ORDER RE DEFENDANT'S MOTION TO SUSPEND

Upon consideration,

It is HEREBY ORDERED that defendant's motion is ALLOWED, and proceedings herein are suspended for a period not to exceed 6 months from the date hereof.

IT IS FURTHER ORDERED that plaintiff's counsel shall, at intervals not exceeding 60 days, advise the undersigned of the status of proceedings before the Board.

H. D. Cooper
Trial Judge

IN THE UNITED STATES
COURT OF CLAIMS

TRIAL DIVISION

No. 356-74

(Filed June 23, 1975)

LIEUTENANT COLONEL JOSEPH B. BERGEN

v.

THE UNITED STATES

ORDER SETTING TIME PERIODS

In view of the attachments to plaintiff's letter of June 9, 1975, it appears that further suspension of this case is inappropriate. It further appears that plaintiff proposes to file an amendment to his pleadings.

IT IS THEREFORE ORDERED that plaintiff shall have 15 days from the date hereof in which to file any amended pleadings and defendant shall have 45 days from the date hereof in which to answer, move, or otherwise plead.

H. D. Cooper
Trial Judge

Chapter 23

PROMOTION OF AFRes OFFICERS TO FILL UNIT AND MOBILIZATION AUGMENTATION GRADE VACANCIES

23-1. Introduction. This chapter tells how AFRes officers are selected for promotion to fill unit and mobilization augmentation grade vacancies. It applies to AFRes officers below colonel (except second lieutenants) who are members of the Ready Reserve. Send suggested changes to USAFMPC (AFPMAJB), Randolph AFB TX 78148.

23-2. Eligibility Criteria. To be considered for promotion under this chapter, an officer must:

a. Be specially qualified and available to fill a vacancy in the Ready Reserve. He satisifies this requirement if he is:

(1) The incumbent of the position; or

(2) An officer of the same grade as the incumbent, in the same locality, and assigned to the same Reserve section as the unit having the vacancy. (If the vacancy is in a unit, the officer must be assigned to that organization. If a mobilization augmentation position vacancy (see table 3-1) exists, he must be assigned to the MAJCOM having the vacancy); or

(3) An officer whose application for assignemnt to a unit having the vacancy has been approved but whose assignment has not yet been effected.

b. Have completed the following amount of promotion service in his current ResAF grade, by the last day of the month immediately preceding the month in which the selection board is scheduled to convene;

For Promotion To	*Years of Promotion Service Computed from PSD*
Captain	2
Major	4
Lieutenant Colonel	4
Colonel	3

23-3. Ineligible Officers. An officer is ineligible for promotion under this chapter if:

a. He is a deferred officer as defined in 10 U.S.C. 8368(a).

b. He has been removed under paragraph 21-8 from a recommended list for permanent promotion.

c. He is on EAD. (If an officer who has been selected for promotion under this chapter enters EAD before being promoted to fill the vacancy, his name will be removed from the recommended list by ARPC.)

d. The highest echelon of command considering his recommendation does not approve it. In this case, ARPC will not submit his name to the selection board, and he may not be recommended again for promotion under this chapter until 9 months after the date of such disapproval.

e. He had previously been recommended to fill a vacancy but the selection board did not select him or any other officer to fill the vacancy and it is less than 9 months since the convening date of the board. (He is not ineligible if the board selected another officer to fill the vacancy or if 9 months have elapsed since that board convened.)

23-4. How To Fill a Vacancy. See table 23-1.

23-5. Commander's Responsibility:

a. A commander or his deputy who receives AF Form 212, "Recommendation for Promotion in the Air Force Reserve," from a subordinate unit will personally approve or disapprove the recommendation. The major commander may delegate this responsibility for the major command to an officer other than his deputy provided the officer is at least a colonel.

Table 23-1

How To Fill a Vacancy

	A	B	C
RULE	To fill a grade vacancy in a Category A unit or in a MAJCOM mobilization augmentation position for promotion to	the commander having the vacancy submits AF Form 212 "Recommendation for promotion in AFRes," through channels to the (see note)	recommendation, whether approved or disapproved
1	colonel	major command	will be forwarded to ARPC, 8800 York St., Denver CO 80205
2	grades below colonel	numbered air force or equivalent echelon of command	

NOTE: A recommendation may be submitted *at any date.* However, for an officer *to be considered by a specific selection board,* the recommendation for his promotion must reach ARPC *no later than 30 days before that board is scheduled to convene.*

b. A commander will notify ARPC DVR COLO by electrical transmission if, before being promoted, an officer becomes ineligible for any reason or becomes unavailable to fill the vacancy, or if the position for which he was recommended is eliminated.

c. A commander who has recommended an incumbent to fill a grade vacancy will, except under unusual circumstances, permit the officer to remain in the position until the results of the selection board which considers him have been announced.

23-6. ARPC Responsibility. ARPC will:

a. Send the selection board schedule to all major commands and separate operating agencies.

b. Verify the eligibility of officers recommended for promotion and return, direct to the originator, recommendations of officers found ineligible for consideration.

c. Forward to USAFMPC (AFPMAJB), Randolph AFB TX 78148, the recommendations and selection folders of officers recommended for promotion to colonel.

d. Submit to the appropriate selection board the recommendations and selection folders of officers recommended for promotion to captain through lieutenant colonel.

e. Notify the selection board when an officer becomes ineligible for promotion after his records have been submitted to the board. (If the board has adjourned and its report of proceedings has been submitted to HQ USAF, that headquarters will be notified.)

f. Insure that the officer whom the board selects is assigned to the position before promotion orders are published.

g. Take action in accordance with table 21-2.

23-7. Promotion of Officers Already on a Recommended List:

a. *If the name of an officer recommended for promotion under this chapter is already on a recommended list* as a result of selection under paragraph 21-3a, *ARPC will not report his name or the vacancy to a selection board for action.* An *officer in this category is promoted as follows:*

(1) *If he is the only candidate to fill the vacancy or if none of the other candidates are on a recommended list, he will be promoted.* No further action is taken on the other candidates.

(2) If two or more candidates are on a recommended list, the senior officer will be promoted to fill the vacancy. No further action is taken on the other candidates.

b. The promotion of an officer in the category specified in a *above* will take place *one day before the promotion of officers not on a recommended list who are selected by the selection board to fill unit or mobilization augmentation grade vacancies.*

23-8. Selection Board Actions:

a. Selection boards convene when required in accordance with chapter 21 to consider officers for promotion under this chapter. Officers whom the board does not select are not deferred within the meaning of 10 U.S.C. 8368(a).

b. ARPC notifies MAJCOMs, separate operating agencies, and AFRRs by letter concerning the convening of each unit vacancy selection board. After receiving the letter, each

AFRR disseminates this information to units under his jurisdiction (see paragraph 11-6h(3) concerning lt cols who have twice failed of promotion).

23-9. Supply of Forms. AF Form 212, attachment 5, will be reproduced locally on 8 x 10-1/2" paper.

Appendix "B"

31 July 1965 AFM 35-3W

60-5. Announcement of Selections. After a report of proceedings has been approved by the Secretary of the Air Force, HQ USAF furnishes major commands and ARPC lists of officers on EAD who have been recommended for promotion and the dates the officers are to be promoted. *ARPC furnishes major commands this information on AFRes officers not on EAD.* HQ USAF furnishes this information ANGUS officers (both EAD and non-EAD) to the Chief, NGB. *Unless otherwise instructed, commanders may immediately release the information received from HQ USAF and ARPC.*

***60-6. Delaying Promotions.** Major commanders or the Commander, ARPC, may delay the promotion of an officer on a recommended list or of a second lieutenant on EAD who is under investigation or against whom proceedings of a court-martial or a board of officers are pending, until the investigation or the proceedings are completed. A promotion, however, may not be delayed for more than 1 year from the date the officer is scheduled to be promoted, unless the Secretary of the Air Force determines that a further delay is necessary in the public interest. Major commanders and Commander, ARPC, furnish HQ USAF (AFPMAJB1) the names of officers whose promotion has been delayed and the reasons for the action. The Chief, NGB, takes this action for non-active duty ANGUS officers. If an extended delay is appropriate, the request must be submitted to HQ USAF (AFPMAJB1) in sufficient time for the Secretary of the Air Force to approve the extension before the 1-year delay has expired.

60-7. Removal From a Recommended List. If, before the date he is scheduled to be promoted, an officer on a recommended list becomes unsuitable for promotion, the major commander concerned, the Commander, ARPC, or the Chief, NGB,

should request HQ USAF (AFPMAJB1) to remove his name from the recommended list. The request, which should be received in HQ USAF in sufficient time for the Secretary of the Air Force to approve the removal before the officer's scheduled promotion date, must be submitted over the signature of the major commander, his deputy or chief of staff; or the Commander, ARPC, or his deputy; or the Chief, NGB, Air, or his assistant. If removal action becomes appropriate in the case of an officer whose promotion was delayed under paragraph 60-6, removal must be approved no later than 1 year after the date the officer was scheduled to be promoted unless the Secretary of the Air Force had approved an extended delay. In such case, removal must be approved no later than the last day of the extended delay.

60-8. Promotion of Selected Officers:

a. Table 60-2 tells how the effective date is determined for each type of promotion.

b. Table 60-3 tells who is authorized to issue promotion orders, where to forward copies, and where to record entries of the promotion.

Appendix "B"

25 June 1969 AFM 35-3

21-6. Announcement of Selections. After a report of proceedings has been approved by the Secretary of the Air Force, HQ USAF furnishes major commands and ARPC lists of officers on EAD who have been recommended for promotion and the dates the officers are to be promoted. *ARPC furnishes major commands this information on AFRes officers not on EAD.* HQ USAF furnishes this information on ANGUS officers (both EAD and non-EAD) to the Chief, NGB. *Unless otherwise instructed, commanders may immediately release the information received from HQ USAF and ARPC.*

21-7. Delaying Promotions. Major commanders or the Commander, ARPC, may delay the promotion of an officer on a recommended list or of a second lieutenant on EAD who is under investigation or against whom proceedings of a court-martial or a board of officers are pending, until the in-

vestigation or the proceedings are completed. A promotion, however, may not be delayed for more than a year from the date the officer is scheduled to be promoted, unless the Secretary of the Air Force determines that a further delay is necessary in the public interest. Major commanders and Commander, ARPC, furnish HQ USAF (AFPMAJB1) the names of officers whose promotion has been delayed and the reasons for the action. The Chief, NGB, takes this action for non-active duty ANGUS officers. If an extended delay is appropriate, the request must be submitted to HQ USAF (AFPMAJB1) in sufficient time for the Secretary of the Air Force to approve the extension before the 1-year delay has expired.

21-8. Removal From a Recommended List. If, before the date he is scheduled to be promoted, an officer on a recommended list becomes unsuitable for promotion, the major commander concerned, the Commander, ARPC, or the Chief, NGB, should request HQ USAF (AFPMAJB1) to remove his name from the recommended list. The request, which should be received in HQ USAF in sufficient time for the Secretary of the Air Force to approve the removal before the officer's scheduled promotion date, must be submitted over the signature of the major commander, vice commander, or chief of staff; or the Commander, ARPC, or his deputy; or the Chief, NGB, Air, or his assistant. If removal action becomes appropriate in the case of an officer whose promotion was delayed under paragraph 21-7, removal must be approved no later than 1 year after the date the officer was scheduled to be promoted unless the Secretary of the Air Force had approved an extended delay. In such case, removal must be approved no later than the last day of the extended delay.

21-9. Promotion of Selected Officers:

a. Table 21-2 tells how the effective date is determined for each type of promotion.

b. Table 21-3 tells who is authorized to publish promotion orders, where to forward copies, and where to record entries of the promotion.

Appendix "C"

Department of the Air Force
Headquarters Military Airlift Command
Scott Air Force Base, Illinois 67775

Reply
Attn. of: MAPPPR (SSgt Turner/3643) 10 Jun 1969

Subject: ResAF Promotion Program - Lt Colonel

To:

AWS (AWPRF)	(2 cys)	436 ABGp (CBPO-RP)	(2 cys)
1400 ABWg (CBPO-RP	(2 cys)	437 ABGp (CBPO-RP)	(2 cys)
62 MAWg (CBPO-RP)	(2 cys)	438 ABGp (CBPO-RP)	(2 cys)
60 ABGp (CBPO-RP)	(2 cys)	63 ABGp (CBPO-RP)	(2 cys)
61 MAWg (CBPO-RP)	(2 cys)	MAC STAFF	(2 cys)

1. Attached are alphabetical lists of Non-EAD Air Force Reserve Officers selected for permanent promotion by the *Reserve Lieutenant Colonel Selection Board* which *convened at Headquarters ARPC* on *3 February 1969.* The lists will be treated as "For Official Use Only" information in accordance with AFR 11-30. Until officially released, the list may be used only by persons charged with the responsibility for administrative processing and necessary reproduction. Selected officers will not be informed prior to *2 June 1969,* the established date for public release, with this letter as a basis of authority.

2. Selected officer will be promoted in accordance with paragraph 60-8, *AFM 35-3.*

3. When delay in promotion or removal from the recommended list becomes appropriate, action will be taken in accordance with paragraph 60-6 and 60-7, AFM 35-3.

FOR THE COMMANDER

J. C. BUTLER, SMSgt, USAF
Actg Ch, Reserve Personnel Division
DCS/Personnel

1 Atch
Recommended List (2 cys)

Appendix "D"

STATEMENT

Neil L. Hartman, Chief of the Officer Promotion Branch, Promotion and Selection Division, Directorate of Personnel Actions, at the Air Reserve Personnel Center (ARPC), 3800 York Street, Denver, Colorado 80205, being duly sworn hereby, deposes and says that he conducted a thorough search of the 1969 board proceedings at ARPC. This search revealed the following information: a Major to Lieutenant Colonel Unit Vacancy Board met on 19 June 1969. Any major selected by this board would have been promoted effective 30 June 1969. *If an individual was on a previous list,* he would have been promoted *automatically, without going before the board,* and that promotion would have been effective one day earlier, which would have been 29 June 1969.

Neil L. Hartman
Chief, Officer Promotion Branch
Promotion and Selection Division
Directorate of Personnel Actions

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

Subscribed and sworn to before me this 2d day of December 1974.
Eunice M. Miller
Notary Public

My Commission Expires February 6, 1976

Appendix "D"

24 June 1972

Subject: Date of Rank of Lt. Col. Joseph B. Bergen, 253-20-6626

To: ARPC, Denver, Colo./Correction of Military Records Board

1. Lt. Col. Joseph B. Bergen, USAFR, was assigned to the office of the Staff Judge Advocate, Hq., 4531st CSG (TAC), Homestead, AFB, Fla., on 5 August 1969, while I was on active duty serving as Staff Judge Advocate of that Air Force Base.

2. Lt. Col. Bergen, who then was a Major on the selection list for promotion to Lt. Col., on 5 August 1969, filled on that date a Mobilization Augmentation Vacancy position in my office of Lt. Col. as a Non-EAD, M-Day assignee.

3. Lt. Col. Bergen was not recommended for immediate promotion persuant to Par. 23-7, AFM 35-3, Ch. 23, since ARPC advised he was not eligible for such promotion.

4. Following subsequent advice that Lt. Col. Bergen was eligible for this immediate promotion consideration, I recommended him for promotion to Lt. Col. This recommendation delay was by reason of the first advice that he was not eligible.

5. The Lt. Col., M-Day slot which Lt. Col. Bergen began filling on 5 August 1969, was available to be filled during the month of June 1969, and had Lt. Col. Bergen requested this position at that time I would have approved this request, as I did on 5 August 1969 when his request was made, and I would have recommended him for promotion on that date under Par. 23-7, supra, as I did after 5 August 1969 when I learned Lt. Col. Bergen was eligible for this promotion.

Stanley Kava
Lt. Col. (Ret.), USAF

29 June 1972

TO: ARPC
Correction of Military Records Board
Denver, Colorado

SUBJECT: Date of Rank of Lt. Col. Joseph B. Bergen, 253-20-6625

1. With reference to my letter of 24 June 1972 pertaining to the promotion of the above officer, upon subsquent review of the file on this matter and noting a letter dated 19 November 1969 to Chief, Promotion Selection Folder Branch, Denver, Colorado, this is to further state for the purpose of making clear the intent of my letter of 24 June 1972, that I wrote the 19 November 1969 letter while under the impression Lt. Col. Bergen (then a Major) had to meet another promotion board before being promoted under Title 10 U.S. Code 8366(d), and thinking that to be the case, I wanted to observe his performance before making a recommendation to a board.

2. That had I known Lt. Col. Bergen was eligible for this promotion without having to meet a new board, I certainly would have immediately recommended him for this promotion as soon as he filled the Lt. Colonel vacancy in my office, as he already had been selected for promotion by one board.

3. Concerning the statement in my letter of 19 November 1969 that Lt. Colonel Bergen had not reported for duty in my office as of that date, the training records of Lt. Col Bergen show that he already had fulfilled his active duty training for that fiscal year in October of that year and that he had completed all but two days training for the first semi-annual period of 1969 - 1970. This duty was performed at Hunter Army Air Field, Georgia, where Lt. Colonel Bergen was attached for training. He therefore could only perform two more inactive duty training periods prior to 1 January 1970 and this was done on 29 and 30 December 1969, the latter date being the date I wrote the promotion recommendation.

STANLEY F. KAVA
Lt. Colonel (RET), USAF

State of South Carolina

County of Charleston

AFFIDAVIT

The affiant, TSgt Prince Tucker, Jr., after being duly sworn by the undersigned officer, authorized to administer oaths, deposed and said under oath before said officer, as follows:

That during the months of June and July 1969, I was NCOIC Reserve Affairs, keeping records of non-EAD M-Day Reserve Officers assigned to 437 Air Base Group (CBPO-RP), Charleston Air Force Base, South Carolina.

That Lt. Colonel Joseph B. Bergen, 253-20-6626 (FV02072096) was MD Judge Advocate Reserve Officer during June and July 1969.

That during the later part of June 1969, I received a list of Reserve Majors selected for promotion to Lt. Col. from Reserve Personnel Division, Hq MAC, Scott Air Force Base, Illinois containing the name of Lt. Col. Bergen. This list had attached to it a cover letter dated 10 June 1969 directing that the selected officers not be informed prior to 2 June 1969.

That because of the delay in receiving this list and the long 4th of July week-end, I did not inform Lt. Col. Bergen of his selection for promotion to Lt. Col. until 7 July 1969.

PRINCE TUCKER, JR., TSgt. USAFR
249-54-3959

Sworn to and subscribed before me this 22nd day of June 1972

SEAL

Lorene C. Lucas
Notary Public

My Commission Expires
22 June 1981

Appendix "D"

STATE OF SOUTH CAROLINA)
) ss:-
COUNTY OF CHARLESTON)

AFFIDAVIT

The undersigned MSGT. PRINCE TUCKER, JR., after being duly sworn and while under oath said as follows:

That during the month of May, 1969, I was NCOIC Reserve Affairs, keeping records of non-EAD M-Day Reserve Officers assigned to 437 Air Base Group (CBPO-RP), Charleston Air Force Base, South Carolina.

That Lt. Col. Joseph B. Bergen, 253-20-6626, who was then a Major, was M-Day Judge Advocate Reserve Officer assigned to Charleston Air Force Base in May, 1969.

That during the month of May, 1969, I assisted Lt. Col. Bergen in his efforts to be reassigned to a Lt. Col. Reserve slot at another Air Force Base since a Lt. Col. slot was not then available at Charleston AFB, in anticipation of Lt. Col. Bergen being notified of his selection by the February, 1969, Lt. Col. Board for promotion to Lt. Col.

That I personally told Lt. Col. Bergen that he had to be in grade as a Lt. Col. no later than 30 June, 1969, to be considered for promotion to Colonel by the Colonel Board convening in 1972 as the cut-off date for his selection was 30 June and information had been received during communications with Hq MAC, Scott AFB, Illinois, that in order for Lt. Cols. to be considered for promotion at that time they had to be in grade three years. It was not unitl June of 1972 that Lt. Col. Bergen became aware of the delay in notifying him of his selection for promotion to Lt. Col. as set out in my affidavit given on 22 June, 1972, as a result of my advising Lt. Col. Bergen of the facts set out in that affidavit.

That this affiant can definitely state that both he and Lt. Col. Bergen were doing everything possible to arrange for Lt. Col. Bergen to fill a Lt. Col. Reserve vacancy before 30 June 1969 so that Lt. Col. Bergen could receive his promotion prior to 30 June, 1969, to make him eligible for consideration to full

Colonel by the 1972 Colonel Board before Lt. Col. Bergen reached 28 years commission service on 30 September, 1972, and these arrangements were made during May of 1969, with the Judge Advocate's Office at Homestead AFB, Florida, but, as stated in my affidavit of 22 June, 1972, I did not see the letter dated 10 June, 1969 from Reserve Personnel Division, Hq MAC, Scott Air Force Base, Illinois, until my return to duty on 7 July, 1969, when I promptly notified Lt. Col. Bergen that I had just received notice that he was on the recommended list for promotion to Lt. Col.

Prince Tucker, Jr., MSgt. USAFR
249-54-3959

Sworn to and subscribed before me this 12th day of May, 1976

Patricia A. Renbert
Notary Public

My commission expires February 19, 1984
SEAL

Appendix "D"

STATE OF GEORGIA)
) ss:-
COUNTY OF CHATHAM)

AFFIDAVIT

The Affiant herein, MSGT. PRINCE TUCKER, JR., after being duly sworn by the undersigned officer authorized to administer oaths, deposed and said under oath before said officer, as follows:

That during the period Lt. Col. Joseph B. Bergen 253-20-6626 (then Major Bergen) was assigned to the Office of the Staff Judge Advocate, 437th Air Base Group (CBTO-RP), Charleston Air Force Base, South Carolina, as a Non-EAD M-Day Reserve Judge Advocate, I was the NCOIC Reserve Affairs, and personally handled Lt. Col. Bergen's assignment transfer from 437th Air Base Group (MAC) where Lt. Col. Bergen, as a Major, was then filling the position (slot) of Captain with an AFSC of 8824, Training Category B, Pay Group B.

That Lt. Col. Bergen was reassigned to 4535th Combat Support Group (TAC), Homestead Air Force Base, Florida, to fill the then existing vacancy of Lieutenant Colonel with an AFSC of 8816, Training Category B, Pay Group B, effective 5 August 1969 under authority of AFM 35-3, as Lt. Col. Bergen was then on a recommended list published by Headquarters, Military Airlift Command, Scott Air Force Base, Illinois, dated 10 June 1969, for promotion to Lieutenant Colonel that authorized the release of that promotion information to the selected officers on 2 June 1969.

That prior to 4 August 1969, during the Fiscal Year 1969-70 (1 July 1969 - 30 June 1970) Lt. Col. Bergen performed all of his inactive duty for training at the Office of the Staff Judge Advocate, Hunter Army Airfield, Savannah, Georgia, where he was attached for inactive duty training purposes pursuant to Reserve Order 76, dated 26 July 1976. [SIC]

That on 29-30 July 1969, Lt. Col. Bergen performed inactive duty training on those two dates at the Office of Staff Judge Advocate, Hunter Army Airfield, Savannah, Georgia, as shown by copy of the AF Form 40A attached hereto received from that installation. Lieutenant Colonel Bergen also performed inactive duty training on 1 August 1969 at Hunter Ar-

my Airfield, Georgia, and then performed his final inactive duty training period at Charleston Air Force Base on 4 August 1969 before reassignment to Homestead Air Force Base on 5 August 1969, as shown by copies of Air Force Form 40A for the period of 1 August 1969 from Hunter Army Airfield, Georgia, and Form 40A dated 4 August 1969 from Charleston Air Force Base, South Carolina, copies of which are also attached hereto.

That on 29 July 1969, Lt. Col. Bergen telephoned me on Autovon from Hunter Army Airfield and requested me to effect his transfer from Charleston Air Force Base, South Carolina to Homestead Air Force Base, Florida, as previously arranged during May 1969, that was held in suspense awaiting notification of Lt. Col. Bergen being selected for promotion to Lieutenant Colonel by the 3 February 1969 Lieutenant Colonel Promotion Board.

That Lt. Col. Bergen had informed me on 7 July 1969 when I advised him of his selection for promotion to Lieutenant Colonel that since 30 June 1969 had passed he would wait until he came to Charleston Air Force Base again at the beginning of August to actually transfer to Homestead Air Force Base as he wanted to complete all but two days of his inactive duty training for that semi-annual period (1 July 1969/30 December 1969) before reporting to Homestead for the final two days of training for that semi-annual period. Lt. Col. Bergen expressed the desire to complete the remaining inactive training for this semi-annual period at Hunter Army Air Force Base with the exception of one day when he wanted to come back to Charleston Air Force Base to tell everyone good-bye before being transferred to Homestead. Under the Training Category B, Pay Group B, Reserve Officers at that time were only allowed six days (credit being given for two days pay) training in any three successive months during any semi-annual period with a maximum amount of training being two days a month and six days during any semi-annual period, so as to spread out the training of the Reserve Officers throughout a twelve month period, which in Lt. Col. Bergen's case extended from 1 July through 30 June of each year for training and pay purposes.

That Lt. Col. Bergen has shown me his duplicate original signed copies of his inactive duty training at Homestead Air Force Base for the period 29-30 December 1969 on AF Form 40A, copies of which are attached hereto, and I identify those forms as evidence of Lt. Col. Bergen's inactive duty training at

Homestead on those two days prior to the end of the semi-annual period of 1 July 1969 — 30 December 1969.

That on 29 July 1969 when Lt. Col. Bergen telephoned me on Autovon from Hunter Army Airfield I completed arrangements on 30 July 1969 for Lt. Col. Bergen to be transferred to Homestead Air Force Base, Florida, which arrangements took no longer than one (1) day to be effective, at Lt. Col. Bergen's request, on 5 August 1969, which was the Tuesday following the maximum training allowed Lt. Col. Bergen at Hunter Army Airfield during July and the last day in August before transfer to Homestead Air Force Base that Lt. Col. Bergen could perform inactive duty training for pay purposes after performing inactive duty training the first day of August 1969 at Hunter Army Airfield, Georgia.

That on 4 August 1969, Lt. Col. Bergen performed his last duty at Charleston Air Force Base, South Carolina, and wound up his affairs at Charleston Air Force Base on that date prior to the effective date of his transfer to Homestead Air Force Base on 5 August 1969, all as previously planned.

That Lt. Col. Bergen also has requested me to outline the typical assignment procedures of M-Day Reserve Officers as opposed to Reserve Officers serving in Units of the United States Air Force and the procedure for promotion in Units as well as the procedure for assigning M-Day Reserve Officers to fill a Mobilization Augmentation Grade Vacancy under the provisions of AFM 35-3.

Reserve Officers assigned to Units, such as a reserve Unit located at Charleston Air Force Base, South Carolina, who are under separate command of other Reserve Officers commanding such Units, who are designated in Training Category A, Group A, and who train in a manner similar to Reserve Officers in separate Air National Guard Units of the Air Force, are separate and distinct from Reserve Officers who are M-Day assignees, such as Lt. Col. Bergen, who are assigned on an individual basis to offices such as the Office of Staff Judge Advocate on an Air Force Base. M-Day assignees fill individual slots and are individually and personally responsible for their own training and obligations to the Air Force, as indicated by a copy of Lt. Col. Bergen's Emergency Orders exhibited to me issued at Homestead Air Force Base which is attached hereto, issued to Lt. Col. Bergen on 18 May 1970 after he received his

Overall Vacancy Promotion on 4 April 1970 to Lieutenant Colonel.

The promotion of Reserve Officers in a Unit is handled through the Reserve Commanding Officer of that particular Unit and processed through the Reserve Affairs Office of the base where said Reserve Unit is located.

Promotions of M-Day assignees are based on the OER's of that particular officer, evaluated by a promotion board that meets at Air Reserve Personnel Center; and the information relating to the announcement of that promotion is ultimately handled by the Reserye Affairs Office of the base where that M-Day Reserve Officer is assigned. No individual recommendations are made by the Staff Judge Advocate, such as the Staff Judge Advocate in an office where Lt. Col. Bergen served, and no recommendations are received for such promotions of M-Day assignees from the Active Duty Staff Judge Advocate under whom a Reserve Officer is serving.

M-Day assignees assigned to a "slot" are positioned in those slots as follows: A first lieutenant or captain may serve in a first lieutenant slot; a captain or major may serve in a captain slot, and a major may serve in a major slot; however, a major may not serve in a lieutenant colonel slot unless that major is on a recommended list for promotion to lieutenant colonel, and within one hundred twenty (120) days after being promoted to lieutenant colonel a lieutenant colonel not filling a lieutenant colonel slot must find a lieutenant colonel vacancy and be assigned to that vacancy so as to fill a lieutenant colonel slot in order to continue in the Active Reserves Training Category B, Pay Group B.

The request for assignment is made directly to the Active Duty Staff Judge Advocate who either approves of disapproves the request, and in the event of a change of assignment, which was approved in Lt. Col. Bergen's case by the Staff Judge Advocate at Homestead Air Force Base, and upon re-assignment, the Air Reserve Officer on that Base, the Headquarters of that Command and Air Reserve Personnel Center, Denver, Colorado, all are notified that the existing Mobilization Augmentation Grade Vacancy has been filled by a named reserve officer. All Training Authorizations (AF Form 40A) are sent to ARPC and training pay is received from ARPC by the reserve officer. That reserve officer is not thereafter removed from that slot or replaced by another reserve officer even though the se-

cond officer may be senior to the first officer filling that slot as long as the first reserve officer filling that slot is satisfactorily performing his duties and fulfilling his active reserve commitments.

Lieutenant Colonel Bergen, while a major and while on a recommended list for promotion to lieutenant colonel, found and was reassigned to fill a lieutenant colonel vacancy existing in the Office of the Staff Judge Advocate, Homestead Air Force Base, Florida, effective 5 August 1969, under the authority set forth in AFM 35-3.

Prince Tucker, Jr.
MSgt. U.S.A.F.
249-54-3959

Sworn to and subscribed before me this 3rd day of December, 1976.

Ellen F. Upchurch
Notary Public, Georgia

SEAL

My commision expires September 22, 1977

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Writ of Certiorari was on this date served on respondent's counsel of record, whose addresses and identities are as follows:

Honorable Griffin B. Bell
Attorney General
Department of Justice
Washington, D.C. 20530

John W. Showalter, Esquire
Attorney, Civil Division
Department of Justice
Washington, D.C. 20530

by placing copies of same in an authorized depository for mail in a properly addressed envelope with sufficient postage thereon to insure first class delivery.

This_____day of August, 1977.

JOSEPH B. BERGEN
Attorney for Petitioner

Columbia Square Law Offices
125-127 Habersham Street
Savannah, Georgia 31401

Telephone: (912) 233-8001

No. 77-257

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH B. BERGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-257

JOSEPH B. BERGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a former Air Force Reserve lieutenant colonel, became subject to involuntary retirement in September 1972 because he had not been selected for promotion to the reserve grade of colonel (see 10 U.S.C. 8848). Petitioner applied to the Air Force Board for the Correction of Military Records (AFBCMR) to change his date of promotion to lieutenant colonel from April 1970 to before July 1969, arguing that prior to the latter date he had met the requirements for an "out-of-sequence" promotion to lieutenant colonel to fill a "unit and mobilization augmentation grade vacancy" (Pet. App. A 23).[1] Petitioner requested this correction because

---

[1]Petitioner received an "in sequence" promotion to lieutenant colonel. In order to avoid mandatory retirement, however, he would have had to be promoted at an earlier date, pursuant to special provisions for "out-of-sequence" promotions (see 10 U.S.C. 8372(b), (d), 8366(d)).

otherwise he could not claim that he should have been considered for promotion to colonel before September 1972. since he would not have served sufficient time in the rank of lieutenant colonel to be eligible for promotion. See 10 U.S.C. 8363(a)(4).

The AFBCMR advised petitioner that he had failed to establish a showing of probable error or injustice (Pet. 5) and it subsequently denied his application for reconsideration (Pet. 6). Petitioner thereafter brought this action in the Court of Claims, seeking reinstatement, back pay, and an order directing the Air Force to convene a special board to consider him for promotion to colonel. The Court of Claims dismissed the action, finding that the AFBCMR's factual determination that petitioner had not met the requirements for out-of-sequence promotion before June 1969 was supported by substantial evidence and was not arbitrary or capricious (Pet. App. A).

1. Petitioner argues that only an improper delay in informing him of his placement on a recommended list for promotion to lieutenant colonel kept him from achieving that rank before July 1969 (Pet. 6-7, 12). He claims (Pet. 12-16) that if he had been informed of his placement on this list on or shortly after June 2, 1969—the first date that persons on the list were permitted to be informed of their status (see Pet. App. C. 39)—he would have been able to meet the other requirements for an

out-of-sequence promotion in time to be promoted to lieutenant colonel before July 1, 1969.[2]

Both the AFBCMR and the Court of Claims, however, determined that petitioner had not demonstrated that he could have met the requirements for out-of-sequence promotion in time to qualify for promotion to lieutenant colonel before July 1, 1969 (Pet. App. A 25-27). Air Force regulations required petitioner to meet all the requirements for promotion 30 days prior to the meeting of the relevant selection board. Air Force Manual 35-3, ch. 23, para. 23-5(a), note (Pet. App. B 34).[3] In this case, that board met on June 19, 1969, so that May 20, 1969, was the last date by which respondent could have satisfied the requirements in time for promotion. The court concluded that petitioner

---

[2]The requirements for out-of-sequence promotion are (Pet. App. A 25-27):

1. Officer's name must be on a recommended list for promotion to Lieutenant Colonel;
2. He must be filling the vacancy slotted for the higher rank (or be assigned to the same unit or Major Command); and
3. He must be recommended for promotion to Lieutenant Colonel by the commander of the unit having the vacancy or if not occupying the vacancy slotted for higher rank, he must be recommended for promotion and to the particular slot by the commander of the unit having the vacancy.

See also Air Force Manual 35-3, ch. 23 (Pet. App. B).

[3]Petitioner contends (Pet. 14) that the 30-day requirement does not apply to out-of-sequence promotions. By its terms, however, the requirement applies to promotions generally without qualification or exception, and the Air Force construes it to apply to out-of-sequence promotions. There is no reason to depart from this construction (see *Udall* v. *Tallman*, 380 U.S. 1, 16), which facilitates preparation for selection board meetings.

had not met two of the three requirements for out-of-sequence promotion by May 20, 1969 (Pet. App. A 25-26)[4] and further that he had no reason even to attempt to meet these requirements prior to that date, since he could not have learned prior to June 2, 1969, that he was on the recommended list (Pet. App. A 27). The Court of Claims therefore rejected petitioner's claim that he could have been promoted before July 1, 1969, if notified of his placement on the recommended list on or shortly after June 2, 1969. The factual determinations underlying this conclusion do not warrant further review.

2. Petitioner incorrectly contends (Pet. 19-20) that the court below failed to follow this Court's decision in *United States* v. *Testan*, 424 U.S. 392, in that it failed to consider whether there was "legal error" by the Air Force in not informing petitioner immediately of his placement on the recommended list as of June 2, 1969. The Court of Claims simply had no occasion to consider whether any delay in so informing petitioner violated Air Force regulations or otherwise infringed upon petitioner's substantive rights, for the delay did not cause petitioner any injury: petitioner would not have met the requirements for promotion in time to be promoted by July 1, 1969, even if he had been notified on June 2 of his placement on the recommended list.

---

[4]On May 20, 1969, petitioner was not assigned to the unit or Major Command that had the vacancy, and he had not been recommended by the Commander of the appropriate unit. The court concluded it did not need to decide whether his name was on the recommended list prior to May 20, since petitioner clearly failed to meet two of the three requirements for out-of-sequence promotion (Pet. App. A 25-26).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.

DOJ-1977-10

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-257

October Term, 1977

LT. COL. JOSEPH B. BERGEN,

Petitioner,

VS.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONER

JOSEPH B. BERGEN
Attorney for Petitioner
Columbia Square Law Offices
125-127 Habersham Street
Savannah, Georgia 31401

Telephone: (912) 233-8001

Of Counsel:

JACK E. MILLER
122 Oglethorpe Avenue, East
Savannah, Georgia 31401

Telephone: (912) 233-4141

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-257

October Term, 1977

LT. COL. JOSEPH B. BERGEN,

Petitioner,

VS.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONER

The petitioner files this Reply Brief to the Memorandum for the United States in Opposition to the Petition for Writ of Certiorari to the Court of Claims filed in this case, pursuant to Supreme Court Rule 24(4), to address the argument first raised in the Memorandum in Opposition to this petition, contending that: " . . . the Air Force construes it *[Air Force Manual 35-3, Ch. 23, ¶23-5a* Note (Pet. App. B 34)] to apply to out-of-sequence promotions." as mandating that petitioner meet certain requirements for promotion such as filling a vacancy slotted for the higher rank and being recommended for promotion to Lieutenant Colonel by the Commander of the Unit having the vacancy (Pet. App. A 25-27) 30 days prior to meeting the relevant selection board. Footnote 3, p. 3 of the Memorandum for the United States.

In the first place, as pointed out in the Petition for Writ of Certiorari, and acknowledged by the Air Force, petitioner here was not required to meet an out-of-sequence selection board. Nevertheless, the Solicitor General now argues that this 30-day requirement does apply to out-of-sequence promotions so as to preclude petitioner from promotion, both because he was not filling this vacancy and did not have a recommendation for

promotion to Lieutenant Colonel 30 days prior to the meeting of the out-of-sequence selection board, which events must have occurred on or before May 20, 1969, since plaintiff could not have been informed of placement on the recommended list making him eligible for out-of-sequence promotions until on or shortly after June 2, 1969 (Pet. App. C 39).

The government now attempts to buttress its argument that petitioner must have met these requirements and that these requirements apply to out-of-sequence promotions — contrary to the contention of the petitioner — because under the ruling of *Udall v. Tallman*, 30 U.S. 1, 16; 13 L. Ed. 2d. 616; 85 S.Ct. 792, an agency construction of a regulation is binding on this court.

The relevant *Udall* discussions in this regard may be found beginning on p. 625, 13 L. Ed., where the court held: "When faced with a problem of statutory construction, this court shows great deference to the interpretation given the statute by the offices or agency charged with this administration." The court goes on to state: "The ultimate criterion is the administrative interpretation which becomes of controlling weight *unless it is patently erroneous or inconsistent with the regulation.*" Then the court continued on page 626, by stating: " . . . in determining the meaning of the statute or the existence of a power, weight shall be given *to the usage* itself . . . when the validity of the practice is the subject of investigation." Finally, the court states: " . . . that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it, is entitled to great respect and, *if acted on for a number of years,* it will not be disturbed except for cogent reasons." [Emphasis supplied].

Now, it must be noted that the Air Force failed to supply the Court of Claims with any "construction" of *Air Force Manual 35-3* adverse to petitioner's construction. The only affidavit supplied by the Air Force was the affidavit of Mr. Neal Hartman dated December 2, 1974, (Pet. App. D 40) that supports petitioner's construction [which indeed caused the government to have petitioner's claim reconsidered by the Board of Correction of Military Records when this case first came before the Court of Claims] stating if an individual was on a previous list, he would have been promoted *"automatically" "without going before the board."* (Emphasis supplied]. The government only argued its contrary construction of this *Manual* based on its lawyers' interpretation and the Court of Claims decision interpreted the *Manual* without a construction by the agency. The Air Force through its Secretary or other authorized official has not construed this *Manual* in the manner that was done in the *Udall* case (p. 626). The petitioner, however, filed an affidavit, that was not refuted (Pet. App. D 46), sworn to by Master Sergeant Prince Tucker, Jr., on December 3, 1976, outlining in detail the construction given by the Air Force to the *Manual* controlling out-of-sequence promotions for reserve officers filling Mobilization Augmentation Grade Vacancies (M-Day Assignees). This affidavit clearly supports the petitioner's construction of this *Manual* that this recommendation need not have been made.

This *Tucker* affidavit clearly shows that the construction given this *Manual* as to the petitioner not needing a recommendation for an out-of-sequence promotion is consistent with the "usage" of the Air Force "acted on for a number of years", and that any administrative interpretation to the contrary would be "patently erroneous" or "inconsistent" with the *Manual* [Regulation], as pointed out in the Petition for Certiorari.

Furthermore, it has been pointed out and emphasized again here that had the petitioner been notified that he was on the recommended list for promotion to Lieutenant Colonel on or about June 2, 1969, he would have immediately filled the vacancy slotted for the higher rank at Homestead Air Force Base, thereby making him eligible for out-of-sequence promotion without a recommendation for promotion to Lieutenant Colonel, the rank to which he was already selected for promotion by a previous overall vacancy board.

As to the second contention in the Memorandum of the government, the *Testan* case (424 U.S. 392) does apply [as counsel for the government so orally argued before the Court of Claims] since the petitioner did not have to meet the requirements the government argues he must have met for promotion in time to be promoted by July 1, 1969. The refusal of the Air Force Board to correct this error was "legal error." Therefore, the Court of Claims should have availed itself of the occasion to consider whether any delay in informing petitioner violated Air Force Regulations or otherwise infringed upon petitioner's substantive rights and whether there was "legal error" by the Air Force in not informing petitioner immediately of his placement on the recommended list as of June 2, 1969, as required by the *Manual.*

For the foregoing reasons and for the reasons set forth in the petition, it is again respectfully submitted that the Petition for Writ of Certiorari should be granted.

JOSEPH B. BERGEN
Attorney for Petitioner

Columbia Square Law Offices
125-127 Habersham Street
Savannah, Georgia 31401

Telephone: (912) 233-8001

Of Counsel:

JACK E. MILLER
122 East Oglethorpe Avenue
Savannah, Georgia 31401

Telephone: (912) 233-4141

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Reply Brief were on this date served on respondent's counsel of record, whose identity and address are as follows:

Honorable Wade H. McCree, Jr.,
Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530,

by placing said copies in an authorized depository for mail in a properly addressed envelope with sufficient prepaid postage thereon to insure first class airmail delivery.

This _____ day of October, 1977.

Attorney for Petitioner